Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1066

NORTHERN COMMERCIAL COMPANY,

Petitioner,

v.

CHARLES SELLS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion and judgment of the court of appeals (App. A, *infra*, pp. 1a-3a) is not yet reported. The Memorandum and Order of the district court granting summary judgment (App. C, *infra*, pp. 5a-21a) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion and judgment of the court of appeals (App. A, *infra*, p. 1a) was entered on

October 6, 1976. A timely petition for rehearing was denied on November 16, 1976 (App. B, *infra*, p. 4a). This petition is timely filed within 90 days of that date.

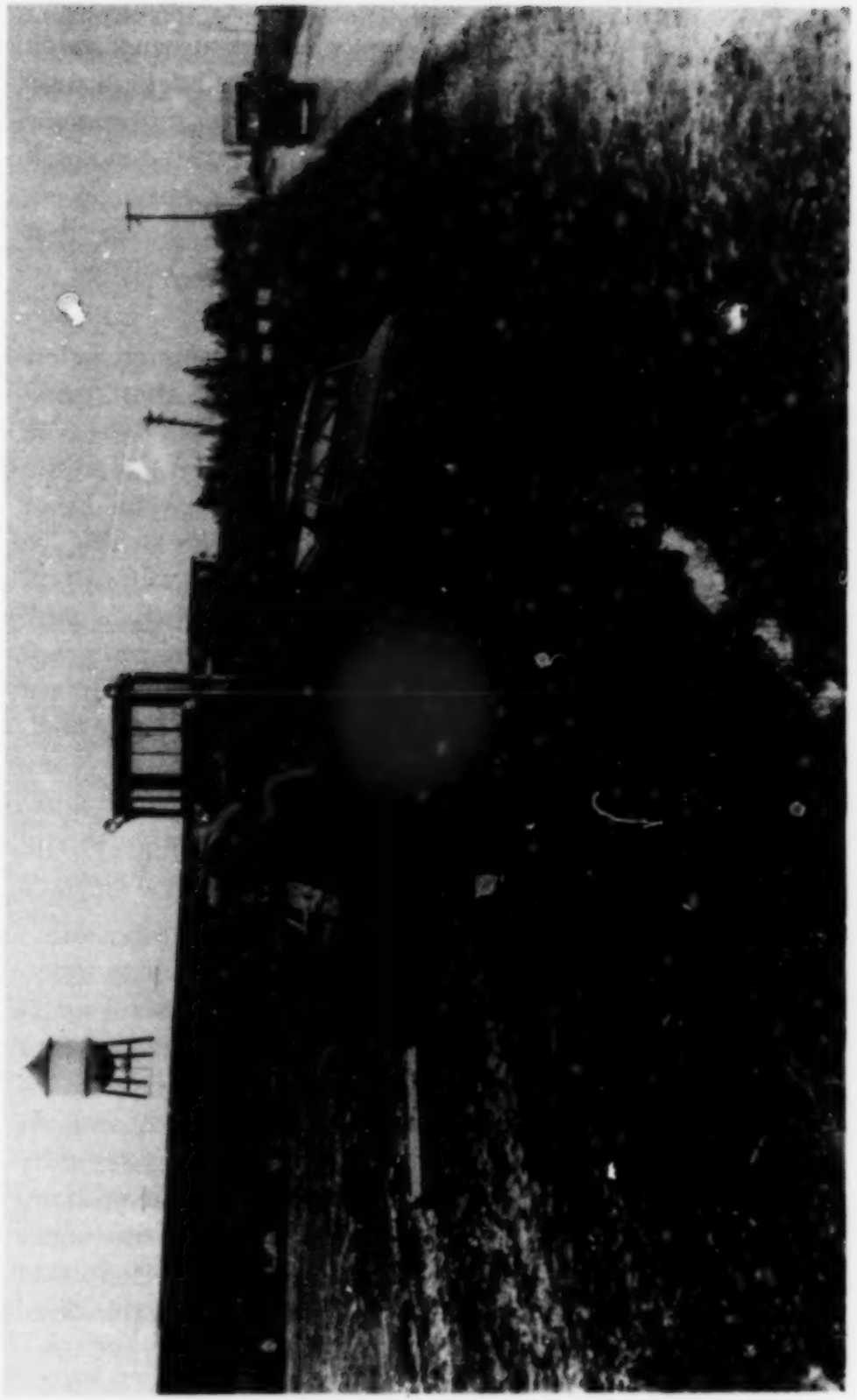
QUESTION PRESENTED

Whether the refusal of the Court of Appeals to permit decision of a negligence issue on a motion for summary judgment violates the letter and purpose of Rule 56, Federal Rules of Civil Procedure.

STATEMENT

On October 3, 1971, during daylight hours, Richard Weldin, age 17, was driving his El Camino automobile on a wet highway in Anchorage, Alaska. The respondent's son, Brian Sells, also age 17, was a passenger in the vehicle. The car went out of control, crossed the centerline of the highway, left the pavement, traveled through a deep drainage ditch, turned 180 degrees, and struck a road grader owned by the petitioner and parked on its own property no less than eighteen feet from the edge of the pavement. Brian Sells was thrown from the automobile and received serious injuries. The scene of the accident, including the position of the road grader, the El Camino and the highway, is accurately reflected by the photograph, a deposition exhibit in the district court, which is reproduced on the opposite page.

The respondent filed suit on January 6, 1972, in state court, and the petitioner removed the action to federal court on the basis of diversity. Extensive discovery was taken over a three-year period by both sides, and on January 31, 1975, the petitioner filed its motion for summary judgment arguing that there was no genuine issue of material fact, and that on the facts established, the plaintiff's claim was insupportable as a matter of law.



On May 2, 1975, the district judge entered a meticulous memorandum opinion exploring every conceivable basis in the record for recovery by the respondent against the petitioner. The district court noted that "motions for summary judgment are only infrequently granted in negligence actions" and that "[a]ll inferences must be resolved against the movant" (App. C, *infra*, p. 19a), but found that in this case the petitioner was entitled to judgment as a matter of law.

A divided court of appeals reversed. Although it felt the question was "close," it noted generally that "questions of reasonableness and foreseeability can rarely be decided as a matter of law because they depend upon the totality of the circumstances in each case," and held that whether the petitioner was "chargeable with knowledge that a vehicle on the highway might skid off a rain and oil slick road and crash into the grader parked where it was" constituted a question of "fact" which "could not properly be resolved on appellee's motion for summary judgment" (App. A, *infra*, pp. 1a-2a). District Judge Nielsen, dissenting, noted that "[d]iligent search by everyone connected with this case, including this court, has revealed no case attaching liability to a landowner in any similar situation," and would have affirmed the judgment of the district court (App. A, *infra*, p. 3a).

REASONS FOR GRANTING THE WRIT

This is a case falling within the diversity jurisdiction of the district court, presenting an issue the decision of which turns upon the facts developed in the record. As such, it is not the type of case normally considered by this Court as appropriate for the exercise of discretionary jurisdiction through a writ of certiorari. One consequence of this normal policy, however, is that an important principle of federal law – the virtually total preclusion of

summary judgment in negligence cases – has been permitted to develop in the courts of appeals without review by this Court. We submit that this principle, so dramatically illustrated by this case, is in conflict with the language and purpose of Rule 56, Federal Rules of Civil Procedure, and deprives the federal courts, in a very large proportion of their caseload, of their most important tool for the prompt and efficient disposition of unmeritorious claims.

There is no question as to the standard of negligence applicable in this case. The respondent himself, in his brief on appeal, stated that the applicable rule is that of the Restatement of Torts 2d, Section 368: A landowner is responsible to persons who "are traveling on the highway" or "foreseeably deviate from it in the ordinary course of travel," for harm caused by a condition which the landowner creates on his land

> "so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway . . ."

It was an undisputed fact in this case that the petitioner parked its road grader beyond a deep drainage ditch at least eighteen feet from the highway, as illustrated by the photograph reproduced herein. Although the court of appeals stated (App. A, *infra*, p. 2a) that the questions of reasonableness and foreseeability depend upon "the totality of the circumstances," neither the court nor the respondent pointed to *any* circumstance indicating that the road grader posed an unreasonable risk of harm to persons who might foreseeably leave the highway in the ordinary course of travel. In short, if this case is not one where summary judgment for the petitioner is proper, then the summary judgment procedure must be regarded as wholly inappropriate on a negligence issue.

The attitude of the court of appeals on this matter was expressed in *Arney v. United States*, 479 F.2d 653, 660 (9th Cir. 1973), also reversing the district court's award of summary judgment for the defendant: "Issues of negligence are ordinarily not susceptible of summary adjudication." This proposition has been repeated so often by courts of appeals as to have become a formula for the almost automatic reversal of any summary judgment under Rule 56 in a negligence case.[1] See, *e.g.*, *Hughes v. American Jawa Ltd.*, 529 F.2d 21, 23 (8th Cir. 1976); *Tarshis v. Lahaina Investment Corp.*, 480 F.2d 1019, 1021 (9th Cir. 1973); *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111, 115 (5th Cir. 1972); *Rogers v. Peabody Coal Co.*, 342 F.2d 749, 751 (6th Cir. 1965); *Roucher v. Traders & General Ins. Co.*, 235 F.2d 423, 424 (5th Cir. 1956). Indeed, one survey of Fourth Circuit cases found that over a 23-year period, only one award of summary judgment in a negligence case was affirmed in that Circuit. Guiher, *Summary Judgments – Tactical Problems for a Trial Lawyer*, 48 Va. L. Rev. 1263, 1265, 1272 (1962). In contrast, the survey found that in North Carolina state courts during a three-and-one-half period, eight out of twelve awards of summary judgment in negligence cases were affirmed on appeal.

The summary judgment procedure of Rule 56 is designed to permit the prompt and efficient disposition of complaints or defenses which, given the liberal pleading requirements of the Federal Rules, are sufficient to withstand a motion to dismiss, but are unsupported by provable facts sufficient to raise a genuine question for trial. See 6 J. Moore Federal Practice ¶56.04[1] (2d ed. 1976). This procedure thus saves the burden and expense of pointless trials, not only for the parties but also for the

[1] Indeed, a review of all reported decisions of the Ninth Circuit for the past five years reflects not a single case in which summary judgment has been upheld in a negligence case.

judicial system. The unrealistic and inappropriate standard for summary judgment in negligence cases illustrated by the decision of the court of appeals in this case in effect deprives the federal courts of this important device for relieving the burden of litigation on the parties and the courts. As Judge Weinstein remarked, referring to the standard under which summary judgment motions must be denied if there is the "slightest doubt" as to the existence of a disputed issue, the standard "means that summary judgment is almost never to be used – a pity in this critical time of overstrained legal resources." *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971). See also Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L. J. 745 (1974).

As of June 30, 1976, there were over 25,000 cases pending in federal district courts involving personal injury claims – approximately eighteen percent of the total federal docket.[2] We submit that the question presented in

[2] 1976 Annual Report of the Director, Administrative Office of the United States Courts, at 86. The figures given in the text are a sum of the following categories of cases listed in the Report: FELA, motor vehicle personal injury, marine personal injury, and other personal injury.

this case – whether, in negligence cases, the plaintiff is entitled to a jury trial even where the record after full discovery shows no basis for recovery – is sufficiently important to the administration of justice in federal courts to warrant review by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2617

CHARLES SELLS, individually
and as parent and next friend
of BRIAN SELLS, a minor,

Plaintiff-Appellant,

v.

NORTHERN COMMERCIAL COMPANY,

Defendant-Appellee.

MEMORANDUM

Appeal from the United States District Court
District of Alaska

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and NIELSEN,* District Judge.

Although the question is close, as the district court's meticulous memorandum discloses, we have concluded that the question of negligence could not properly be resolved on appellee's motion for summary judgment. Should appellee have realized that parking its road grader on its property some 18 feet from the edge of the highway created an unreasonable risk of harm to those who foreseeably could deviate from the highway?[1] The

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*Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

[1] We assume for the purpose of the discussion that the grader was parked 18 feet from the highway because the district court

[Footnote continued]

district court held that the answer is negative as a matter of law.

The questions of reasonableness and foreseeability can rarely be decided as a matter of law because they depend upon the totality of the circumstances in each case. Among the circumstances are the conditions of the particular highway adjacent to appellee's property that appellee knew or should have known: Was the highway straight, curving, flat, narrow or wide? What were the conditions of visibility of the grader? What speeds should the appellee have anticipated that vehicles would be travelling when they approached its property? What kind of hazard did the grader pose?

None of the cases cited helps us very much. The cases involving poles or other fixtures do not pose the same kinds of problems as mobile equipment such as trucks, road graders, and other vehicles. The landowner may have very little choice in where he can locate fixtures and, at the same time, give himself maximum enjoyment of his real property. To be sure, a landowner may be similarly limited as to places to park his vehicles under some circumstances, but no such circumstances here existed.

As a matter of fact, the appellee may not be chargeable with knowledge that a vehicle on the highway might skid off a rain and oil slick road and crash into the grader parked where it was, but we cannot say that the conclusion follows as a matter of law.

REVERSED.

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made that assumption in deciding the motion. The evidence on the subject was conflicting, and the district court took the evidence most favorably to the appellant to avoid the conflict which the court knew could not be resolved on summary judgment.

NIELSEN, District Judge, Dissenting:

I respectfully dissent.

I do not think that any reasonable jury could find that a landowner must foresee that a car traveling in the daylight on an urban highway is going to leave that highway at such a speed that it will go through a deep ditch and strike the landowner's road grader parked at least 18 feet from the edge of the highway. Therefore, the landowner owes no duty to any occupant of such a car.

It is submitted that this situation is clearly not covered by Restatement, Second, Torts §368, which provides:

"§368. Conditions Dangerous to Travelers on Adjacent Highway

A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who

(a) are traveling on the highway, or

(b) foreseeably deviate from it in the ordinary course of travel."

Diligent search by everyone connected with this case, including this court, has revealed no case attaching liability to a landowner in any similar situation.

I would therefore affirm the decision of the District Court granting summary judgment to the defendant.

/s/ Leland C. Nielsen

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2617

CHARLES SELLS, individually
and as parent and next friend
of BRIAN SELLS, a minor,

Plaintiff-Appellant,

v.

NORTHERN COMMERCIAL COMPANY,

Defendant-Appellee.

ORDER

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and NIELSEN,* District Judge.

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CHARLES SELLS, individually
and as parent and next friend
of BRIAN SELLS, a minor,

Plaintiff,

vs.

NORTHERN COMMERCIAL COMPANY,

Defendant.

No. A-14-72 Civil

MEMORANDUM AND ORDER
GRANTING SUMMARY JUDGMENT

This is a negligence action begun in state court and thereafter removed to federal court on the basis of diversity jurisdiction. 28 U.S.C. §§1332, 1441. On October 3, 1971, Richard Weldin was driving north on Arctic Boulevard in his 1965 El Camino Chevrolet. Plaintiff, Brian Sells, was a passenger. The vehicle went out of control, crossed the centerline, and left the west side of the roadway. Plaintiff claims that the El Camino thereafter collided with a motor grader owned by Northern Commer-

cial Machinery Company (N.C.) that was parked close to the road. At some point during the course of the accident Brian Sells was thrown from the vehicle and afterwards was found lying in front of the grader. He received very serious injuries, for which he claims N.C. is liable. Besides legal questions, factual matters in dispute include the cause of the loss of control of the vehicle and the proximity of the grader to the road. Defendant has moved for summary judgment and plaintiff has opposed this motion. Fed. R. Civ. P. 56.

Plaintiff alleges that one of the factors resulting in the loss of control of the vehicle was oil on the pavement caused by defendant's operation of its business of selling and servicing heavy equipment. This allegation raises at least four issues: was there oil on the highway; did the oil cause the El Camino to skid; did the oil accumulate on the highway due to N.C.'s operations; if the oil film was caused by N.C., was N.C. negligent. Various statements and the deposition of Officer Metrokin, the investigating police officer, suggest an affirmative answer to the first issue (film of oil on road) and the bare possibility of an affirmative answer to the second issue (it was a factor in the accident). However, there is no direct evidence on the third issue (was the oil on the highway due to N.C.), or the fourth issue (was N.C. negligent). Because of this, plaintiff seeks to rely on inference and circumstantial evidence. Plaintiff asserts that the jury is entitled to infer that N.C. is responsible for the oil from the facts that N.C. operates a machinery company, heavy equipment has a known propensity to leave oil slicks, and the oil film was somewhere in the vicinity of the entrance to N.C.'s business.

The use of circumstantial evidence is discussed in Prosser, *Torts*, 4th Ed. §39, p. 212:

> "Like all other evidence it may be strong or weak; it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming. The gist of it, and the key to it, is the inference or process of reasoning by which the conclusion is reached. This must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion. *It is not enough that plaintiff's counsel can suggest a possibility of negligence. The evidence must sustain the burden of proof by making it appear more likely than not.* The inference must cover all of the necessary elements of negligence, and must point to a breach of the defendant's duty." [emphasis added]

Courts have used similar language in describing the requirements of circumstantial evidence: *Dent v. Hardware Mutual Casualty Co.*, 86 Id. 427, 388 P.2d 89 (1963) (circumstantial evidence must show that plaintiff's theory is the more reasonable conclusion to be drawn therefrom, and not equally consistent with another theory); *Bottjer v. Hammond*, 200 Kan. 327, 436 P.2d 882, 884 (1968) (that the only reasonable conclusion to be drawn therefrom is plaintiff's); *Elms v. Chicago, Rock Island and Pacific Railroad Co.*, 375 P. 2d 886 (Okla. 1962) (not merely speculation or conjecture); *Schmidt v. Pioneer United Dairies*, 60 Wn. 2d 271, 373 P.2d 764 (1962) (only plaintiff's conclusion can fairly and reasonably be drawn therefrom).

Often the use of circumstantial evidence in tort cases is considered under the terminology of *res ipsa loquitur*. *The Restatement of Torts*, Second, provides in §328D(1)(a):

> "(1) It may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when

> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> . . ."

The Court cannot hold that the presence of an oil film on a heavily traveled highway is such an event. Subsection (b) of §328D(1) additionally limits the making of this inference to when:

> (b) other responsible causes including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence.

Subsection (b) embodies the requirement that it must be the defendant's negligence that caused the accident. *Prosser* puts it this:

> "It is never enough for plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. . . . The injury must either be traced to a specific instrumentality or cause for which the defendant was responsible, or it must be shown that he was responsible for all reasonably probable causes to which the accident could be attributed. Accordingly, *res ipsa loquitur* is held not to apply where a chair is thrown from an unidentified window in the defendant's hotel, or where the presence of such an object as a bolt on a railway platform might easily have been due to the act of a third party, or where gas or water or electricity escape from fixtures controlled in part by another.
>
> "Where such other causes are equally probable, there must be evidence which will permit the jury to eliminate them. . . . Again, however, the evidence need not be conclusive and only enough is required to permit a finding as to the greater probability." Prosser, Torts, 4th Ed., §39, 218-219.

Here, the only evidence that relates the oil to the defendant is that the entrance of defendant's machinery is in the vicinity. The sketch of Officer Metrokin, who investigated the accident, does not place the film directly at the entrance. (Exhibit E to Metrokin's deposition.) Metrokin could only speculate as to the source of the oil. (Metrokin's deposition, page 17.) The manager of the Anchorage branch of the N.C. Machinery Company, Gary Ratzlaff, has submitted an affidavit stating that almost all of the heavy equipment is brought in by railroad or low boy trailers and that:

> "On the day of the accident involving the El Camino pickup there was no oil on Arctic Boulevard that could specifically be attributed to the operations of Northern Commercial and its employees."

Plaintiff has offered no evidence to support his inference.

Although the Court has been unable to find any decisions holding as a matter of law that the inference sought by plaintiff is not supportable in the case of oil on the highway, it has found several "mud" cases. *Meil v. Syracuse Constructors, Inc.*, 240 N.Y.S. 2d 403, 19 App. Div. 2d 10 (1963); *Heuay v. Halifax Construction Co.*, 254 N.C. 252, 118 S.E. 2d 615 (1961); *Davidson v. Cooney*, 259 Ia. 1278, 147 N.W. 2d 819 (1967). In each of these cases, the inference sought was that the mud on the highway adjacent to an excavation was caused by the excavator's trucks. This is admittedly a close question. In *Meil* the inference was permitted (2 judges dissenting). In *Heuay* it was not. In *Davidson*, the inference was also permitted, and it is a good case to show the type of evidence that can be developed to make the inference reasonable. But here we are dealing with oil. The only vehicles which are likely to leave mud on the highway are those that have been off the pavement. All vehicles have the potential of dropping oil. One would expect mud to

be deposited soon after entering on the pavement, as it would fly off the wheels. There is no particular spot one would expect to find oil on the highway. There is no evidence of a spill, but only a film. There is no evidence of heavier deposits of oil closer to N.C.'s entrance. In short, the mud cases, which are themselves "close," are much stronger than our oil case. A jury would have to resort to mere speculation to determine the source and the cause of the oil film. Such speculation is not enough to prevent the granting of motion for summary judgment. *Ayers v. Pastime Amusement Company,* 283 F. Supp. 773 (D.S.C. 1968); 10 Wright & Miller, *Federal Practice & Procedure,* §2727, p. 549. Summary judgment will therefore be granted on this issue.

The other issue to be considered is whether defendant was negligent in parking the road grader near Arctic Boulevard. There is conflicting evidence on the proximity of the grader to the road. Defendant's evidence suggests the grader was 24 to 25 feet from the edge of the pavement. This evidence includes: the statement of Officer Metrokin, who arrived at the scene of the accident 12 minutes after it occurred, that he paced the distance off at 25 feet (Metrokin deposition, page 13, Exhibit E); a picture of the accident scene taken by Metrokin during his investigation, which Richard Weldin, driver of the vehicle, and Charles Sells, father of the plaintiff, acknowledge as accurate (Weldin deposition, page 56, C. Sells deposition, page 39); a plotting of the location of the vehicles from their location in the picture taken by Metrokin, by surveyor William Tucker locating the grader 24 feet from the pavement (affidavit of William Tucker); and a plotting of the position of the grader by Tucker showing it 25 feet from the pavement after its location was physically pointed out to him on January 22, 1975, by Gerald Johnson and Gay Morrell, employees of N.C.,

who arrived at the scene of the accident shortly after it occurred and have personal knowledge of the location of the grader. (Affidavits of Tucker, Johnson and Morrell).

In opposition to this evidence, plaintiff relies on the statements of Charles Sells, plaintiff's father, a letter written by Mark Sells, plaintiff's brother, and the affidavit of plaintiff's attorney swearing to facts reported to him by a presently unavailable investigator, Francis Wirth. The Court cannot consider most of plaintiff's evidence, however. The letter written by Mark Sells and the statements of Charles Sells both indicate that the day following the accident the two went to its site with a tape measure, talked to an unidentified individual who indicated that the grader had not been moved since the accident, and took various measurements fixing the position of the grader at 12½ feet from the road. The statements of the unidentified individual are, of course, hearsay and not admissible. *Rego v. Decker,* 482 P.2d 834, 841 (Ak. 1971). They cannot be relied on in a summary judgment motion to create a genuine factual dispute. *Twelve Hundred "L" Street Corp. v. Inlet Company,* 438 P.2d 708, 710 (Ak. 1968).

Without this hearsay evidence, plaintiff must rely on the assumption that the grader had not been moved since the time of the accident. Ordinarily, there is no presumption that because a condition existed at one time it existed prior to that time. *Millard v. Mitchell Bros. Truck Line,* 263 Or. 34, 500 P.2d 713 (1972); *State v. Crawford,* 13 Ariz. App. 225, 475 P.2d 515, 518 (1970); *Blaine Fashions, Inc., v. Scheri Shop,* 84 Nev. 339, 440 P.2d 904, 905 (1968); *Richardson v. Farmers Union Oil Co.,* 131 Mont. 535, 312 P.2d 134, 145 (1957). This is not an inflexible rule, however, if factors indicate that the inference is justified. *Allen v. Matson Navigation Co.,* 255 F.2d 273, 281 (9th Cir. 1958); *Ferran v. Jacquez,* 68

N.M. 367, 362 P.2d 519 (1961); *State v. Pritchard*, 47 Wn. 2d 545, 288 P.2d 480 (1955). Plaintiffs however, have suggested no such factors. Indeed, the only evidence that the Court is aware of suggests that the grader had been moved. The day of the accident, Officer Metrokin measured the distance of the grader to the entrance to the N.C. business at 60 feet. (Metrokin Deposition, page 10.) The next day the Sells' measured it at only 43 feet. (Charles Sells deposition pp. 26-27.) This would be consistent with the grader being moved toward the N.C. entrance and Arctic Boulevard. In addition, Brian Sells' glasses were found on the right rear side of the grader. (Charles Sells deposition, page 20.) But Brian Sells was thrown out and landed at the left front side of the grader. (R Weldon deposition, pp. 47-48, exhibit B, C.) This is again consistent with the possibility that the grader moved forward toward the N.C. entrance (south) and to the left (closer to the pavement) between the time when the two measurements were made. It is true that Charles Sells indicated that he saw some marks and gouges in the mud, but their cause is unclear, and they derive their significance largely from the hearsay statements of the unidentified individual the Sells' talked to.

Under these circumstances, there is no basis for the inference that the same conditions found on October 4 by the Sells' existed on October 3, the day of the accident. Even were Charles Sells' measurements admissible, their usefulness is severely hampered because he is not clear where he made the measurement from. (Charles Sells deposition, pp. 24-25.)

In addition to the defects with the substantive content of the Sells' statements, the letter written by Mark Sells cannot be considered for another reason; it is hearsay. *Meyst v. East Fifth Avenue Service, Inc.*, 401 P.2d 430, 437 (Ak. 1965); *Beavers v. State*, 492 P.2d 88, 96 (Ak.

1971). It would not be admissible at trial. In addition, it cannot be considered an affidavit because it has not been sworn to as it must be in order to be considered on a summary judgment. *Local Union No. 490, U.R.C., L&P Wkrs. v. Kirkhill Rubber Co.*, 367 F.2d 956 (9th Cir. 1966).

The only remaining evidence relied on by plaintiff is that developed in plaintiff's attorney's affidavit. It states in part:

> "Upon being retained to represent plaintiff I engaged the services of Francis X. Wirth, Jr., an investigator. On November 5, 1971, Mr. Wirth reported to me, in pertinent part, that the accident in question had occurred on a Sunday P.M.; that no one was working in the area at that time and that he had found no eye-witness but was able to photograph the defendant's grader 'sitting in the same position as it was on the day of the accident. It is approximately 28' (twenty-eight feet) from the centerline of the highway. I say approximately because there is visible painted centerline on this pavement.'
>
> "I am unable to provide an affidavit at this time by Mr. Wirth because he is working as a supervisor of the LIZ TWO space station near Pt. Lay on the Dewline. I communicated with Mr. Wirth on February 17, 1975 at his then last known address in Fairbanks, and received his reply from the Dewline."

Rule 56(f) does permit exceptions from the requirement that affidavits be filed, and the circumstances here fall within one of those exceptions. 6 Moore, *Federal Practice* ¶56.24, p. 2878. It would be better if plaintiff's attorney stated what efforts were being made to acquire an affidavit, and when it could be expected. But even if the above information were in affidavit form, there would be some question as to its admissibility. Mr. Wirth does not explain how he could tell that the grader was "sitting in

the same position as it was on the day of the accident," when he had found no eye-witnesses that could relate this to him. The Court is also uncertain as to how "approximate" the measurement is. But accepting what Mr. Wirth has to say as admissible, the most that it shows is that he determined the grader to be 18 feet from the pavement (Tucker's affidavit and attached exhibit show that the road is 20 feet wide, and since Mr. Wirth states that the grader was 28 feet from the centerline, it was 18 feet from the edge of the pavement). This figure is substantially different from the inadmissible Sells' evidence as well as defendant's evidence.

A sub-issue in the dispute of the distance of the grader from the pavement concerns the location of the highway right-of-way. Whether the grader was 25 feet from the edge of the pavement, 18 feet or only 12½ feet, it was on N.C.'s property and not on the right-of-way. The affidavit of William Tucker states that Arctic Boulevard is entirely on the Alaska Railroad right-of-way, that the edge of the pavement runs along the boundary of that right-of-way and N.C.'s property, and that the land records do not reflect any easement for the highway extending onto N.C.'s property. This made a *prima facie* case that there was no such easement. However, plaintiff was able to suggest a legal theory where by operation of law, the State of Alaska would have succeeded to an easement in favor of the United States created by operation of law. 48 U.S.C. §321(a)-321(d). The key question in the applicability of this theory, is whether the land was entered for homestead prior to August 10, 1949. Of course, plaintiff cannot avoid summary judgment merely by posing theoretical questions. 10 Wright & Miller, *Federal Practice & Procedure,* §2727, p. 551. And after the movant has made a *prima facie* case, the burden shifts and the opponent must show specific facts justifying

denial of summary judgment. *Id.* p. 538, *et. seq.* At any rate, defendant has demonstrated that the land was homesteaded in 1945, so that plaintiff's theory is inapplicable. In addition, the patent through which defendant claims title contains no reservation of an easement. Ordinarily, the description in the patent is conclusive. *Grainger v. United States,* 197 Ct. Cl. 1018, 1024 (1972). And one may challenge a patent only if he can show that the patentee should not have received it and that the challenger is entitled to it. *Kale v. United States,* 489 F.2d 449 (9th Cir. 1973); 63 Am. Jur. 2d *Public Lands* §35. From the above, it is clear that plaintiff's theory is without merit and the Court holds that the road grader was not on the highway right-of-way.

Plaintiff argues that even if the grader was 25 feet from the edge of the pavement, it still presents a jury question of whether the defendant was negligent. The Court will resolve every inference in plaintiff's favor and assume that the grader was only 18 feet from the road in testing his legal theories.

The basic proposition that plaintiff seeks to assert is the rule that a landowner whose property abutts on a highway is liable for his negligence in creating an artificial condition on his property that involves an unreasonable risk of harm to those traveling on the highway who forseeably deviate from it. The *Restatement of Torts,* 2nd, recognizes this rule in §368:

> "A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who

(a) are traveling on the highway, or:

(b) forseeably deviate from it in the ordinary course of travel."

It is approved in Prosser, *Torts,* 4th Ed. §57. Numerous cases, *infra,* have applied this rule. The key to the inquiry is the distance of the condition from the highway, and the danger created by the condition. *Restatement of Torts,* 2nd., §368, comment h; *Louisville & N.R. Co. v. Anderson,* 39 F.2d 403 (5th Cir. 1930).

In support of his assertion that there is a jury question as to defendant's negligence in parking its grader 18 feet from the edge of the pavement and the edge of the right-of-way, plaintiff relies on four cases. *Gerbich v. Southern California Edison Co.,* 5 Cal. 2d 46, 53 P.2d 948 (1935); *Birmingham Electric Co. v. Lawson,* 239 Ala. 236, 194 So. 659 (1940); *El Paso Electric Co. v. Leeper,* 42 S.W. 2d 863 (Texas 1931); *Kentucky Utilities Co. v. Sapp,* 249 Ky. 406, 60 S.W. 2d 976 (1933). These are all utility pole cases where the courts held that it was a jury question whether the locating of the pole in close proximity to the highway was negligence. In *Gerbich,* the pole was 6 feet from the concrete, 4 feet from the macadam on a dirt area often driven on; in *Birmingham,* the pole was within the right-of-way, adjacent to the traveled portion of the road; in *El Paso,* the pole was on the right-of-way; in *Kentucky Utilities,* the pole was at the edge of the shoulder which was approximately 2½ feet wide. These cases lend little support for plaintiff's theory that liability can extend 18 feet from the pavement. The Court has also looked to the cases cited in *Annot.* 3 A.L.R. 2d 6 (1949). Significantly, the annotation places the dividing line at three feet from the roadway. The Annotation notes that it is often held that there is a jury question when the pole or post is less than three feet from the roadway. 3 A.L.R. 2d at 43. As the distance from the

highway increases, negligence is still a jury question in some cases. *Weiss v. Holman,* 58 Wis. 2d 608, 207 N.W. 2d 660 (1973) (4 feet from road); *United Gas Pipeline Co. v. Jones,* 236 Miss. 471, 111 So. 2d 240 (1959) (3½ feet from edge of pavement); *Ohio Bell Telph. Co. v. Ling,* 129 Ohio St. 505, 196 N.E. 371 (1935) (5 feet from inside edge of portion of Y in road); *Lambert v. Westchester Electric Co.,* 191 N.Y. 248, 83 N.E. 977 (1908) (4 feet from paved fire station driveway). But in many cases where the distance is greater than three feet, the issue of negligence is taken from the jury. *Mississippi Power Co. v. Sellers,* 160 Miss. 512, 133 So. 594 (1931) (pole 8 feet from road beyond drainage depression); *Ohio Postal Teleg. Cable Co. v. Yort,* 64 Ohio App. 189, 28 N.E. 2d 646 (1940) (pole 11 feet from highway); *Feichter v. Corbin,* 254 Ky. 178, 71 S.W. 2d 423 (1934) (pole 7 feet from pavement); *Ellis v. State,* 16 App. Div. 2d 727, 226 N.Y.S. 2d 803 (1962) (pole 5 feet 10 inches from pavement); *Vines v. Southwestern Mississippi Electric Power Ass'n.,* 241 Miss. 120, 129 So. 2d 396 (1961) (pole 3½ feet from traveled way); *Jafek v. Public Service Co.,* 183 Okla. 32, 79 P. 2d 813 (1938) (pole 4 feet from shoulder).

In addition, there are cases of *Beyer v. City of Los Angeles,* 40 Cal. Rptr. 341 (1964); *Kinne v. State,* 8 A.D. 2d 903, 186 N.Y.S. 2d 895 (1959); *Hayes v. Malkan,* 26 N.Y. 2d 295, 258 N.E. 2d 695 (1970); and *Millard v. Mitchell Bros. Truck Line,* 263 Or. 34, 500 P.2d 713 (1972). In *Beyer,* the appellate court upheld the granting of a nonsuit where plaintiff collided with a water valve that the city installed 12 feet from the edge of the pavement on private property. The nonsuit was granted on the ground that defendant had breached no duty owed to plaintiff. *Kinne* held as a matter of law that the state was not negligent in maintaining a maple tree beyond the shoulder of the highway with which plaintiff collided.

Hayes held as a matter of law that the landowner was not liable for injury to a traveler arising out of a collision with a pole located on his property, even though it was only 7 inches from the road. The court distinguished excavations as 'traps,' and explained its decision at 258 N.E. 2d 696:

> "Were we to apply the *Trabisco* [negligence is a question of fact for the jury where the pole is on the right-of-way] rule to the facts in this case, we would be severely restricting the property owner's use of his own land. Indeed, under such a holding, a driver, swerving off the road and striking an object entirely on private property, would be entitled to bring an action against the landowner and have a jury pass upon the question of whether the placement of the object, regardless of its distance from the road, was such to create an unreasonable danger to travelers on the highway.
>
> "Carried to its logical conclusion, this rule would require a landowner to remove every tree, fence, post, mailbox, or name sign located on his property in the vicinity of the highway, or permit them to remain, subject to possible liability. This, in our opinion, would impose an intolerable burden upon a property owner."

Three judges dissented. They rejected the notion that a jury trial would always be required if the right-of-way property lines were not accepted as the boundary to liability. They distinguished between the pole being 7 inches from the highway, as it was there, and 7 feet from it, thus implying no jury question would be presented in the latter case. Finally, in *Millard* the Oregon Supreme Court held that no jury question was presented by plaintiff's claim that defendant negligently parked his truck in an unsafe place. Plaintiff's vehicle had collided with defendant's truck while it was parked on an 8 foot wide

area beside the road; the road consisted of two lanes in each direction, each 12 feet wide, and a center area 12 feet wide; the area for parking on the side of the highway was ample for the truck; it was at night, but the street was lighted and the pavement was dry.

As stated earlier, the distance from the road is not controlling. The important factor is the risk involved. One would expect a greater clear area on roads with higher speed limits. But Arctic Boulevard is an urban road with corresponding speed limits. Similarly, the condition of the road is a factor. Here, the roads were wet.

The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. It is that the movant should be granted his judgment if there are no disputed factual issues and he is entitled to it as a matter of law. *Braund, Inc., v. White,* 486 P.2d 50, 53 (Ak. 1971). All inferences must be resolved against the movant. *McKean v. Hammond,* 445 P.2d 679, 682 (Ak. 1968). Because of the role of the jury in applying the reasonable man standard, motions for summary judgment are only infrequently granted in negligence actions. 10 Wright & Miller, *Federal Practice & Procedure* §2729, p. 560. However, there are times when summary judgment is appropriate if there are no disputed material factual issues. *Morrison v. City of Anchorage,* 390 P.2d 782 (Ak. 1964); *Thomas v. Furness, Ltd.,* 171 F.2d 434 (9th Cir. 1948). 10 Wright & Miller, *Federal Practice & Procedure,* §2729, p. 561. But a genuine factual issue is not presented when one party's understanding of the fact is based on hearsay evidence which would be inadmissible over objection at trial, and the other party's understanding of the fact is based on direct, non-hearsay evidence. *Twelve Hundred "L" Street Corp. v. Inlet Company,* 438 P.2d 708, 710 (1968).

Although there is little admissible evidence to support such a finding, the Court finds for the purpose of this motion that the grader was 18 feet from the edge of the road. On the basis of this finding, the Court holds that the defendant is entitled to summary judgment as a matter of law in that it breached no duty owed to plaintiff. The cases discussed show that as the distance of the obstruction from the highway increases, the willingness of the Courts to impose liability or submit the question to the jury decreases. No case has been found imposing liability at a distance even remotely close to 18 feet. It is not necessary for the Court to decide if a jury question would be presented if the road grader were only 12 feet from the road, or some other distance. Nor is it necessary to decide whether the location of the grader on private property immunizes the owner from liability, as in *Hayes v. Malkan, supra.* It is enough to hold that 18 feet is too far. The Court so holds. Defendant owed plaintiff no duty at the point at which it was located. One of the essential elements of a cause of action for negligence is therefore missing.

Plaintiff in his response to defendant's motion fails to set forth specific facts showing that there is a genuine issue for trial.

After considering the pleadings, depositions, briefs and all other papers and documents filed in support of and in opposition to defendant's motion for summary judgment, the Court finds and concludes that there is no genuine issue as to any material fact and that the defendant, Northern Commercial Company, is entitled to summary judgment as a matter of law.

Counsel for defendant shall within twenty (20) days, prepare, serve and submit to the Court for its consideration, an appropriate proposed form of judgment.

It is so ORDERED.

/s/ Raymond E. Plummer

Senior Judge

Dated: May 2, 1975

Copies to: Joe P. Josephson, Esq.
James J. Delaney, Esq.